

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RALPH J. ORTEGA
Claimant

VS.

CCM COUNTERTOP & CABINET MFG.
Respondent

AND

CONTINENTAL WESTERN INS. CO.
Insurance Carrier

Docket No. **1,038,580**

ORDER

Respondent and its insurance carrier request review of the July 1, 2008 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

This is an appeal from the second preliminary hearing held on this claim. At the first preliminary hearing the claimant alleged a repetitive use injury to his right wrist. Respondent denied the claim and argued an intervening accident claimant had suffered was more probably the cause of his right wrist condition. The ALJ determined claimant's right wrist condition was caused by his repetitive work with respondent and that decision was affirmed on appeal to the Board.

The second preliminary hearing was held upon the request of respondent in order to present as an exhibit (not part of the record in the first preliminary hearing) the handwritten response from Dr. Jean Louis Gabriel to a series of questions posed by an adjuster for respondent's insurance carrier. No other testimony nor exhibits were offered at the second preliminary hearing but the ALJ was told that the record from the first preliminary hearing was considered part of the evidentiary record for the second preliminary hearing.

The Administrative Law Judge (ALJ) again determined claimant injured his right wrist each and every working day through January 7, 2008. The ALJ ordered respondent

to pay temporary total disability compensation beginning January 8, 2008, and authorized Dr. Gabriel as claimant's treating physician.

Respondent requests review of whether claimant's right wrist injury arose out of and in the course of employment with respondent.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The Board Order dated June 25, 2008, contains a detailed recitation of the facts and is incorporated herein by reference. Briefly stated, claimant worked for respondent doing finishing work on countertops. On May 17, 2007, claimant injured his ring finger on his left hand by getting a piece of plastic countertop in his finger, which in turn got infected. He received medical treatment with Dr. Dobyns, and continued to work after his injury. While continuing to work claimant alleged that he suffered repetitive injury to his right wrist.

While the claimant was undergoing physical therapy for his finger in June and into July 2007, he began to complain of pain in his right wrist. He stated that he told the therapist that he injured his right wrist while working from the excessive load pulling and having to favor his left finger from his previous injury in May. He stated that "the right wrist was having to pull more weight on it and there's quite a bit of weight . . . it was straining it too much" and "it started to swell".¹ The physical therapy notes dated July 3, 2007, mentions that the therapist's goal was to reduce the strain on claimant's right wrist and further noted swelling in claimant's medial right wrist. Claimant still continued to work for the respondent doing the work that he could do. Claimant stated that he notified respondent of the problems he was having with his right wrist.

On September 27, 2007, claimant was hit by an SUV while riding a bicycle and landed on his right hip and shoulder but he stated he did not land on or hurt his right wrist. He stated that he talked with Marcia Traylor, the president of the company and told her that there was something the matter with his wrist because it was hurting a lot. Claimant stated that Ms. Traylor told him she would do some checking on what needed to be done and at some point he was contacted by Mr. Morehead from Continental Insurance who told him that he would need to file a separate claim for his wrist injury.

Dr. Jean L. Gabriel in his October 17, 2007, office note indicated that the claimant's wrist pain was probably from his change in body mechanics due to the injury to his left

¹ P.H. Trans. at 7.

finger. He considered the right wrist aggravated by overuse. Dr. Gabriel was aware claimant had been hit by the SUV but noted claimant stated that he did not injure his wrist at that time.

In a later office note dated January 7, 2008, Dr. Gabriel noted that claimant's arthritis in his wrist may have been temporarily aggravated by the SUV accident. Respondent's insurance carrier then contacted Dr. Gabriel in January 2008 and posed a number of questions regarding claimant's wrist complaints, his arthritis and their connection to his bicycle accident. In response to the adjuster's letter, Dr. Gabriel penned a response that suggested that claimant's wrist symptoms were a function of the aging process but aggravated by his fall in the SUV collision with claimant's bicycle. It is significant to note that Dr. Gabriel indicated in his responses that claimant's continued right wrist pain was caused by arthritis. Based upon these notes, the adjuster terminated benefits.

The issue now raised is whether Dr. Gabriel's later written responses to the few questions posed by the insurance adjuster is more persuasive than the doctor's earlier notes that attributed claimant's right wrist complaints to overuse at work.

Dr. Gabriel initially concluded that claimant's overcompensation for his left finger injury gave rise to right wrist complaints, most likely in the form of an aggravation of his preexisting arthritis. This conclusion is supported by claimant's testimony that he compensated for his left hand limitations, that he told the physical therapists, that the right wrist swelling was noted and that this all occurred before the September 27, 2007 bicycle accident. The later equivocation by Dr. Gabriel is not persuasive given that he also noted that the bicycle accident aggravation might be temporary. Moreover, as noted in the Board decision on the appeal from the first preliminary hearing, Dr. Gabriel did not review Dr. Murati's treatment records from the bicycle accident and thus, any conclusions Dr. Gabriel might have made about that accident are, at best, speculative. The ALJ concluded that claimant's right wrist aggravation arose out of and in the course of claimant's continued work activities from May 2007 up until January 7, 2008. This Board Member affirms that decision.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.³

² K.S.A. 44-534a.

³ K.S.A. 2007 Supp. 44-555c(k).

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated July 1, 2008, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of September 2008.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Elaine F. Winter, Attorney for Claimant
James M. McVay, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge